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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 717

JOHN S. GORSUCH, *Petitioner,*

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Comes now Respondent, Provident Security Life Insurance Company, and presents this brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed herein by John S. Gorsuch, Petitioner.

STATEMENT

The "two separate and distinct actions for the benefit of United" filed by the petitioner were separated in time by more than three years. The derivative suit was filed by Gorsuch on November 4, 1958. The present action was filed by him on February 12, 1962, three or four days after Provident (respondent here) had sought to intervene in the first action under the mandate of the United States Court of Appeals in *Niesz v. Gorsuch* (9 CA, 1961), 295 F. 2d 909, 913.

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The present action was brought by Gorsuch as an individual stockholder of United. He argued in the District Court that his suit was not a derivative or class action of any sort. Now he seeks to change his position by the assertion that the suit was "for the benefit of United." His complaint (TR 3-5) does not so indicate in any respect, nor does it comply in any particular with Rule 23 (b), Federal Rules of Civil Procedure.

The stockholders' meeting of United held in 1959, and referred to in the petition, was not "caused" by American as the petition declares. It was called by the officers of United to consider the merger agrement of February 7, 1959 (TR 12 et seq.).

Following the merger of the two Arizona corporations—United and Provident—in the spring of 1959, 79.5% of the entire outstanding stock of United, *exclusive* of the shares voted by American for the merger, was exchanged for Provident stock under the merger agreement, and the holders thereof thereby expressly ratified and confirmed the merger. The stock held and voted by American (referred to generally in the District Court and on appeal as the "Kelly stock") was surrendered and cancelled, exactly as the merger agreement provided.

United was insolvent and its reserves substantially impaired at the time of the merger. This condition dated from the autumn of 1957, and Provident had nothing to do with it. Since the merger the policies issued by United have been assumed and continued in force by Provident, all claims have been paid, and reserves have not only been maintained but improved.

But for the merger, liquidation proceedings as to United by the Arizona Director of Insurance would have been mandatory, under Arizona law. Arizona Revised Statutes, Sec. 20-728.

Gorsuch, the petitioner here, was given full notice of the proposed merger in 1959 as a stockholder of United. He made no objection to the merger. He filed no dissent. He owned 1.5% of the outstanding stock of United, of a par value of $1,500.00. He is the only stockholder who has ever questioned the validity of the merger. The old corporation, United, is not a party to the suit, nor has any creditor of United complained of the merger.

The Arizona Director of Insurance, pursuant to the state statute (A. R. S. Sec. 20-731) concerning the merger of domestic stock insurance companies, expressly approved the merger agreement on February 26, 1959. Not only did he do this, but he actively worked toward the consummation of the merger as an alternative to liquidation of United.

The Memorandum Decision and Order which formed the basis for the summary judgment later entered (Appendix A to petition) was dated and filed on March 28, 1962. This was 44 days after the filing of the action, and 12 days after the filing of plaintiff's motion for summary judgment. The Decision expressly provided that the judgment to be entered thereon "shall not be effective for any purpose, other than as to the status of Provident, United and their shareholders in cause #2974,[1] supra, until further order of the court." This

[1] The action filed by Gorsuch on November 4 1958; twice appealed to the Court of Appeals for the Ninth Circuit (295 F. 2d 909; 323 F. 2d 826) and now before this Court on certiorari petition in No. 709.

somewhat novel restriction would appear to indicate that the judgment was designed paramountly for its strategic effect in the other action, and sheds some light on the actual purpose of the present suit.

The Court of Appeals reversed the summary judgment—and set aside the default of the defendant which for good measure had been entered by the District Court—and remanded the cause for further proceedings. The case is not closed. It is open to petitioner to pursue his efforts to nullify the 1959 merger at the trial level if he cares to do so. The opinion of the Court of Appeals (Appendix B to petition; 323 F. 2d 839) painstakingly examines each of the grounds found by the District Court to support its summary judgment that "the Merger Agreement dated February 7, 1959 * * * was and remains null and void, of no force and effect, and is hereby declared to be void ab initio" (AR 42), and concludes that it is insufficient to sustain the judgment under the facts and circumstances of the case. The opinion sets forth in footnotes the Arizona statutes discussed, as well as portions of the record.

ARGUMENT

1. *The Arizona law relative to the case was reasonably and properly construed by the Court of Appeals, and no reason exists for the issuance of a Writ of Certiorari.*

The contention of the petitioner is that the Arizona statutes regarding domestic insurance corporations and their merger have been "rewritten" by the Court of

Appeals for the Ninth Circuit, and that the Court "refused to follow" those statutes. By implication it is suggested that the District Court correctly and faithfully followed and interpreted the applicable statutory law and that its judgment on the matter is to be preferred to that of the Court of Appeals.

Petitioner has not cited a single decision of the Arizona Supreme Court which is in the slightest degree at variance with the decision of the Court of Appeals here. There is none. Only one Arizona case is mentioned in the petition, and that is *Lewis v. Stone* (1927), 32 Ariz. 182, 256 P. 1048. That decision was cited by *appellant* (respondent here) in its opening brief in connection with the effect of the failure to file a copy of the merger agreement with the County Recorder of Maricopa County, Arizona. The point made by appellant, and in regard to which the case was cited, was that Gorsuch could not complain of this oversight since he had *actual notice* of the instrument. Arizona follows the general rule that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice. *Pomeroy v. Sam Thorpe Mining Co.* (1931), 37 Ariz. 541, 553; 269 P. 255, 259. Further in this connection, the *original* merger agreement *was* filed with the Arizona Corporation Commission in Phoenix on July 27, 1959 (TR 12), as provided by law—the identical statute incidentally (A. R. S. Sec. 10-345A) which the appellee below contended was violated by the failure to file a copy with the Maricopa County Recorder, whose office also happens to be in Phoenix.

It is a strange irony that petitioner should now appear in the garb of a champion of the Arizona law.

While this case was before the District Court the defendant urged again and again, both before the judgmetn and in the post-judgment motions, that the merger had been substantially and faithfully carried out under the Arizona law; that this was clearly shown, inter alia, by the express approval of the merger by the Arizona Director of Insurance, acting pursuant to his duty under Arizona law. The District Judge gave absolutely no weight or effect to this administrative approval of the merger by the Arizona state official specifically charged by law with passing upon mergers of Arizona insurance companies (A. R. S. Sec. 20-731). He gave no consideration to the undisputed fact that the merger had been fully operative and the old corporation (United) extinct for almost three years. He chose to ignore the fact that Gorsuch, the plaintiff, had full knowledge and notice of the proposed merger in 1959 and had made no objection to it during the intervening years. The trial court gave no heed to the factual showing made in support of the post-judgment motions that the judgment, if allowed to stand, would resurrect an insolvent and impaired insurance company with disastrous effects upon the former policyholders whose policies had been assumed by Provident, as well as to its stockholders, including Gorsuch himself.[2]

The plaintiff below, of course, fully supported the trial court in all these intransigencies.

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[2] The Arizona Constitution (Art. 14, Sec. 11) imposes individual liability on the shareholders of insurance corporations for corporate debts in addition to the amount invested in stock, to the extent of the par value of stock held.

Petitioner asserts that "there is no Arizona law" supporting the opinion of the Court of Appeals. But the Arizona statutes involved—including several that petitioner does not mention—were carefully construed and followed in the light of general principles of law which there is absolutely no reason to believe would not be followed by the Arizona courts. Certainly petitioner has suggested none. If the absence of Arizona authority on the points involved is ground for granting certiorari here, then in *any* Court of Appeals case where state law is construed the issuance of a writ would follow from the simple happenstance that the state courts had not previously construed the law.

The Court of Appeals for the Ninth Circuit has not "decided an important state * * question in a way in conflict with applicable state * * law." Hence, under Rule 19 of this Court no reason appears for the granting of the writ sought by petitioner. There is no showing that the contentions made by petitioner are of interest to anyone but himself. As noted, he stands alone as the plaintiff here; no other stockholder has joined him; no creditor of United stands with him; the Arizona administrative authority charged with responsibility in respect of insurance company mergers is aligned squarely against him. The real lack of substance of his petition becomes apparent when it is remembered that the case in which he is party plaintiff is at issue now, under the mandate of the Court of Appeals, and he is at liberty to pursue it as a fully-adversarial proceeding at the trial level.

2. *The asserted "vitiation" of Arizona law governing the merger of insurance companies by the Court of Appeals is non-existent.*

Under the guise of showing how the Court of Appeals "vitiated" Arizona law the petitioner has gone over each of the four bases for the holding by the District Court that the merger was void and invalid (petition, pp. 6-9). The Court of Appeals considered these asserted grounds separately and in patient detail. Its opinion is sufficient answer to this argument, if it be considered appropriate to a request for certiorari. A few comments may be in order.

The only basis or ground set forth in the complaint for the alleged invalidity of the 1959 merger, and the only reason advanced in support of plaintiff's motion for summary judgment, was that the requisite two-thirds vote of the stock of United was not voted in favor of the merger "for the reason that 38.79% of the stock voting for the merger was unlawfully held by American Security Investment Company." (TR 4; TR 9-11). On this point the Court of Appeals held that any impropriety in the acquisition of the assets of United, which occurred in 1957, did not affect American's title to the stock, or its right to vote it. The petitioner has never suggested what alternative method of dealing with this block of stock was preferable, or how it should have been handled. It was voted and then surrendered and cancelled. It is immaterial here that "the sellers are not complaining", as petitioner asserts. Nor is it true that he is acting "in United's behalf", as he now maintains. The issue was simply whether the stock in question was properly held and voted by American. Petitioner's professed fears that the opinion will enable minority stockholders to loot a corporation and then (presumably alone) bring about a merger are groundless. Arizona law requires a two-

thirds vote of *all* outstanding stock as a prerequisite to merger.

All the other "grounds of invalidity" which found favor with the District Court were pure afterthoughts of the plaintiff below[3], having been raised subsequent to his motion for summary judgmenta. The belated assertion that the merger was invalid because all assets of United did not pass to Provident under the merger is not only in plain contradiction of the merger statute itself, it is in direct conflict with the allegations of the complaint! (para. 6, TR 3-4).

The argument that American was not the "record owner" of the stock which it voted and that therefore the vote was invalid is particularly specious. Under the Uniform Stock Transfer Act, adopted in Arizona in 1943, the endorsement of the certificates in blank and their delivery to American in 1957 was sufficient, as the Court of Appeals held. A. R. S. Sec. 10-231. Further, according to some of the materials presented by plaintiff himself in the lower court there was in fact a transfer of the stock to American on the books of United. The "notice" argument of petitioner (petition, p. 7) is hollow. Both corporations involved and all their stockholders were given advance notice of the meetings *and of the merger agreement*, which itself sepcifically refers to the stock held by American.

As for the failure to record a copy of the merger agreement in the office of the County Recorder of

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[3] Or of the District Court itself. The point that American was not the "record owner" of the stock in question was raised in an affidavit filed by plaintiff, but was not independently asserted by him prior to the court's Memorandum Decision.

Maricopa County: this has been touched upon above. The copy *was* filed before the appeal, and the filing was called to the attention of the district judge. The defect, if any, was certainly remedied before the judgment become final. To contend, as petitioner has, that the mere failure to file the copy in this particular office resulted in a total, jurisdictional failure of the merger under the circumstances of this case (which could never thereafter be cured) is to ignore reality and to magnify a formal directive out of all rational proportion.

CONCLUSION

In his peroration the petitioner insinuates that there was some unholy connection between the acquisition of United's assets in 1957 and the merger that occurred eighteen months later; that the guilty corporation, American, somehow brought about the merger to avoid liability for its wrong. He speaks picturesquely of the merger as taking place "underneath a bridge in the dark of night." In point of fact, American gained nothing by the merger, nor did it thereby escape any liability for what it had done. As petitioner himself points out (petition, p. 3) final judgment has been entered against American in the derivative action. It received nothing for the stock which it voted and then surrendered. The merger proceedings themselves were carried on in the full light of day. Notice was given to all stockholders of both corporations involved. The merger was accomplished under the supervision and with the approval of the Arizona Director of Insurance.

Gorsuch is the only individual who has entered an objection to the merger. He did not do so until 1962. He has not shown that he has been damaged by the merger—he has not even alleged it (complaint, TR 1).

The petition for a writ of certiorari should be denied.

Respectfully submitted:

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